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No. 20550

United States Court of Appeals
for the Ninth Circuit

NATIONAL FARMERS UNION PROPERTY and CASUALTY COMPANY,

Appellant,

vs.

LAURENCE COLBRESE, JR.,

Appellee.

On Appeal from the United States District Court for the District of Montana.

Brief of Appellee

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STATEMENT OF THE CASE

We agree with appellant that this court has jurisdiction. The facts are completely and accurately stated by the District Court in its Findings of Fact (Tr., Vol. I, p. 55, et seq), and in the District Court's "Memorandum Opinion" on the motion for summary judgment (Tr., Vol. I, p. 37, et seq). The brief of appellant does not in some respects present accurately and fairly the evidence as it actually exists in the record. Despite some repetition appellee will summarize the facts for the convenience of the Court.

On December 3, 1960, Duaine Colbrese, son of plaintiff Laurence Colbrese, Jr., was riding as a passenger in a 1949 Ford sedan, driven by Jerry Kinney, on U. S. Highway #10 at a point approximately one mile east of Reedpoint, Montana, when the automobile skidded on ice, left the highway, upset and caused injuries to Duaine Colbrese which resulted in his death. At the time of his death, Duaine Colbrese was 16 years of age. (Complaint, Par. II & III; Admitted in Answer, Par. 3).

The ownership of the 1949 Ford is treated separately hereafter, (p. 7), but suffice it to say at this point that registered title was in one C. W. Ehart, who had died previous to December 3, 1960. (Tr., Vol. I, p. 38)

At the time of the accident, the Ford was not cover-

ed by an insurance policy listing it as the insured vehicle. However, on and prior to December 3, 1960, Albert Kinney, the father of Jerry Kinney, owned two other vehicles (a 1951 Dodge automobile and a 1954 International 1½-ton truck), both of which were insured by the appellant insurance company under policies listing Albert Kinney as the named insured (Exhibits 5 & 6), providing for bodily injury liability coverage, property damage coverage, and medical payments coverage, (Tr., Vol. I, p. 57). These policies also provided coverage of any relative of the named insured while using any "non-owned" automobile, provided the "non-owned" automobile was not regularly furnished for the use of such relative, (Tr. Vol. I, p's 59, 60).

On May 26, 1961, Laurence Colbrese, Jr., appellee herein, filed an action in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, in which Laurence Colbrese, Jr., was plaintiff and Jerry Kinney was named defendant, wherein Colbrese prayed for judgment and damages in the total sum of $40,850.00, including, as special damages, the sum of $850.00 as casket, funeral and cemetery expenses. (Tr., Vol. I, p. 57)

After the action was filed, Albert Kinney, as father of Jerry Kinney, made written demand upon appellant that it appear and defend said action on behalf of Jerry

Kinney. Appellant declined to accept the defense of the action and declined to admit coverage under any of the policies theretofore issued to Albert Kinney. (Complaint, Par. VIII, admitted by Answer, Par. 7, Tr., Vol. I, p's 4, 10)

After a change of venue, in the Montana District Court proceedings, from Yellowstone County to Stillwater County, Montana, an offer of compromise was made by Jerry Kinney, through his guardian ad litem, Albert Kinney, for judgment to be taken against Jerry Kinney in the sum of $18,850.00. This offer of judgment was accepted by Laurence Colbrese, Jr., and judgment was entered on October 16, 1962, in the said amount, together with costs in the sum of $312.88, making a total judgment of $18,862.88. (Tr., Vol. I, p. 58)

After entry of said judgment, Jerry Kinney, acting through his attorney, made demand upon appellant in writing for payment of the said judgment. The defendant declined to accept liability for the judgment under any of its policies of insurance. (Tr., Vol. I, p. 58)

On June 7, 1963, Albert Kinney was appointed by the District Court of the Thirteenth Judicial District, in and for the County of Yellowstone, as guardian of Jerry Kinney, and letters of guardianship were issued to him on June 7, 1963. On the same day, Albert Kinney, as guardian, petitioned the Court for an order au-

thorizing him to execute for his ward an assignment of Jerry Kinney's right to sue for and collect indemnity from appellant in the amount of the judgment entered against it, plus attorneys' fees, in consideration of satisfaction of the judgment by Laurence Colbrese, Jr. On said date, an order was entered by the presiding Judge in the State District Court authorizing the guardian to execute such an assignment in consideration of such satisfaction. The assignment was executed on June 12, 1963, the judgment satisfied, and Colbrese has brought the present action on the basis of the said assignment. (Tr., Vol. I, p. 59)

As stated above, at the time and place of the accident hereinabove referred to, the 1949 Ford was registered, with the State Registrar of Motor Vehicles of the State of Montana, in the name of C. W. Ehart. No "Certificate of Ownership" (title) to said motor vehicle has ever been issued to anyone other than C. W. Ehart since the date of the accident. (Tr., Vol. I, p. 56)

The primary question submitted for decision of the trial court was whether the 1949 Ford, as operated by Jerry Kinney, was covered under the "non-owned" automobile" provisions of the insurance policies issued to Albert Kinney by appellant on the Dodge automobile and International truck.

Each of the insurance policies required the appel-

lant to pay on behalf of "the insured" all sums which the insured should become obligated to pay as damages because of:

> "A. Bodily injury, sickness or disease, including death resulting therefrom, hereinafter called bodily injury, sustained by any person * * *
>
> "Arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile * * *."

The following are listed as insureds under the liability portions of the policies:

> "(a) With respect to the owned automobile,
>
> (1) the named insured and any resident of the same household.
>
> (2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;
>
> (b) With respect to a non-owned automobile,
>
> (1) the named insured,
>
> (2) any relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative; * * *
>
> " 'Non-owned automobile' means an automobile or trailer not owned by the named insured or any relative, other than a temporary substitute automobile;"

(Tr., Vol. I, p's 59, 60)

The issue of ownership was first presented to the trial court on a motion for summary judgment filed by appellant, which was denied, (Memorandum Opinion,

Tr., Vol. I, p. 37, et seq). In his memorandum opinion denying the motion for summary judgment, Judge Jameson held that the 1949 Ford was a "non-owned automobile" by reason of the fact that no "certificate of ownership" (title) ever was issued to Albert Kinney in compliance with the provisions of *Sec. 53-109, R.C.M. 1947,* (Tr., Vol. I, p. 39), relying upon *subsection (d) of Sec. 53-109,* and the case of *Safeco Ins. Co. v. Northwestern Insurance Co., (1963) 142 Mont. 155, 382 P.2d 174.*

After appellant's motion for summary judgment was denied, two trials were held, the first with an advisory jury, (Tr., Vol. II), on the question of whether the Ford had been regularly furnished for the use of Jerry Kinney (the jury found that the Ford had not been regularly furnished for his use) (Tr., Vol. I, p. 34); and a second trial, before the Court, on all other defenses raised by appellant. (Tr., Vol. III) After submittal of briefs by the parties, the Court adopted its Findings of Fact and Conclusions of Law. (Tr., Vol. I, p. 55) This appeal followed.

FACTS RELATING TO OWNERSHIP

The facts, as to ownership of the Ford, can be stated as follows:

In 1957, Albert Kinney purchased a small ranch near Laurel, Montana, with all machinery thereon, from one Mrs. McCormick, the heir of the original owner,

C. W. Ehart. Parked on the ranch was a 1949 Ford sedan with a broken "rear end", (Tr., Vol. II, p. 10), registered in the name of C. W. Ehart. Both Mrs. McCormick and Albert Kinney thought this Ford was included in the sale of the ranch and machinery, and Mrs. McCormick gave Albert Kinney the keys and registration certificate (enabling the possessor to purchase a license for the auto), but no "certificate of ownership" (title) was executed or transferred to Kinney. (Finding of Fact V, Tr., Vol. I, p. 56)

About August 27, 1958, Kinney had the "rear end" repaired, (Tr., Vol. II, p. 20) and started using the car. Shortly thereafter (on September 2, 1958, Tr., Vol. II, p. 10), he procured insurance thereon from appellant (Finding of Fact XV, Tr., Vol. I, p. 60), fully advising the insurance company's agent that he had not received the ownership certificate. (Finding of Fact XVI, Tr., Vol. I, p's 60 & 61) The insurance was kept in force until September 3, 1960, at which time Kinney declined to renew it for the following reasons (in his words):

> "Well, I had given up on getting title to the car and it had quit running. I figured it would be just foolish for me to fix it up, not being able to get title, so I just parked it and just let the insurance lapse."
>
> (Tr., Vol. II, p. 11)

Then approximately 3 weeks before the accident,

(Tr., Vol. II, p. 12), Albert Kinney's son-in-law, home on furlough from the Navy, fixed the Ford and Albert Kinney used it "a time or two" from that time until the day of the accident. (Tr., Vol. II, p's 18, 19) At no time did Mrs. McCormick comply with the title registration statutes of Montana, although Kinney, on four or five occasions, requested the attorney handling the Ehart estate proceedings to furnish a "certificate of ownership" (title) on the Ford. (Finding of Fact No. V, Tr., Vol I, p. 57)

ARGUMENT ON THE ISSUE OF OWNERSHIP SUMMARY:

1. THE 1949 FORD AUTOMOBILE WAS A "NON-OWNED" AUTOMOBILE WITHIN THE MEANING OF ALBERT KINNEY'S INSURANCE POLICY BY REASON OF THE FACT THAT NO CERTIFICATE OF OWNERSHIP EVER WAS ISSUED TO KINNEY IN COMPLIANCE WITH *SECTION 53-109, R.C.M. 1947.*

ALBERT KINNEY COULD HAVE ACQUIRED TITLE OR OWNERSHIP OF THE 1949 FORD ONLY BY TRANSFER.

SUBSECTIONS (a) AND (b) OF SEC. 53-109, R.C.M. 1947 PROVIDE THE SOLE PROCEDURE FOR EFFECTING A VOLUNTARY TRANSFER OF A MOTOR VEHICLE FROM ONE PERSON TO ANOTHER.

FAILURE TO COMPLY WITH THE ABOVE SUBSECTIONS PRECLUDED THE ATTEMPTED TRANSFER FROM BECOMING EFFECTIVE FOR ANY PURPOSE, *SEC. 53-109(d), R.C.M. 1947.*

SINCE THERE WAS NO COMPLIANCE WITH SUBSECTIONS (a) AND (b), NO TRANSFER FROM MRS. McCORMICK TO ALBERT KINNEY WAS EVER ACCOMPLISHED AND ALBERT KINNEY WAS NOT THE "OWNER" OF THE 1949 FORD.

"NON-OWNED" WAS DEFINED IN THE INSURANCE POLICIES MERELY AS "NOT OWNED BY THE NAMED INSURED," NO DEFINITION OF "OWNED" BEING SUPPLIED. SINCE "OWNED" IS A GENERIC AND GENERAL TERM AND THUS AMBIGUOUS, IT MUST BE CONSTRUED IN ACCORDANCE WITH THE GENERAL LAW AND STATUTES OF MONTANA, AND ANY UNCERTAINTY RESULTING FROM FAILURE TO DEFINE THE WORD IN THE POLICY MUST BE RESOLVED IN FAVOR OF THE INSURED. THIS PRECLUDES ANY ATTEMPT BY THE INSURER TO DEFINE "OWNED" AS BEING EQUITABLE, QUALIFIED OR ANYTHING

LESS THAN THE RECORD OWNERSHIP PROVIDED BY THE MOTOR VEHICLE REGISTRATION STATUTES.

Albert Kinney never obtained a certificate of ownership of the 1949 Ford, nor was such a certificate ever issued to him. At all times pertinent to this case, the said automobile was registered to C. W. Ehart. *Subsection (d) of 53-109, R.C.M. 1947* provides:

> "(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."

Subsections (a) and (b) were never complied with. Therefore, subsection (d) compels the conclusion that the intended transfer to Albert Kinney was not *valid or effective for any purpose.* Thus, the 1949 Ford was a "non-owned" automobile covered by Albert Kinney's insurance policies. District Judge W. J. Jameson so held following the language of the statute as it was interpreted in Safeco. *(Safeco Ins. Co. of America v. Northwestern Mutual Ins. Co., (1963) 142 Mont. 155, 382 P.2d 174.)*

The *Safeco* case was a declaratory judgment action to determine which of two insurance companies was primarily responsible for the defense of one Harlan

Dean and any liability imposed upon him for an accident which occurred when Dean was driving a 1958 Studebaker car which he had procured from a used car lot in Havre, Montana, in trade for a Hillman automobile owned by him. Safeco Insurance Company carried the liability insurance on the Hillman automobile or any "owned" replacement and Northwestern Mutual Insurance Company carried liability insurance on the used car dealer. (Tr., Vol. I, p. 40)

The trial court in the *Safeco* case found that there had been a completed sale even though the requirements of the motor vehicle registration statutes of Montana *(Sec. 53-109, et seq)* had not been complied with, and thus that the Studebaker was no longer owned by the used car dealer but was owned by Dean and covered by the Safeco policy on the Hillman as a replacement automobile. (Tr., Vol. I, p. 40)

On appeal, the plaintiff-appellant in the *Safeco* case contended that motor vehicles could be transferred as to ownership only by endorsement of the title as required by *subdivision (a) of Sec. 53-109, R.C.M. 1947,* and that under *subsection (d)* of the same statute, delivery, passing of title, or the transfer of any interest in the automobile could not be valid or effective for any purpose without compliance with such statute. *(382 P.2d at 176)*

The Supreme Court of Montana agreed with the

plaintiff-appellant and reversed the District Court; holding that no attempt having been made by the parties to the transaction to comply with *Sec. 53-109,* there never was a completed sale. The Court also stated that the provisions of the Motor Vehicle Code provided that exclusive method of accomplishing a valid sale and transfer of a motor vehicle in Montana. *(382 P.2d, 179)*

In the instant case, Judge Jameson obtained and examined the briefs of all parties to the *Safeco* case, including one filed by amicus curiae (Tr., Vol. I, p. 41) and concluded that the *Safeco* case was in point on the critical aspects and bound him. (Tr., Vol. I, p. 78)

By the *Safeco* case, we submit, the Montana Supreme Court has ruled once and for all that, in Montana, the title registration statutes are the exclusive method of accomplishing a valid sale and transfer of a motor vehicle, and thus that no set of circumstances falling short of compliance with the statute can result in a completed sale.[1] As applied to the case at bar, the failure of Mrs. McCormick and Albert Kinney to comply with the provisions of *(Sec. 53-109)* preclude Kinney from being considered the "owner" of the Ford, under the policies involved.

The attempted transfer here was from an heir, (Mrs.

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(1) This holding was recently followed by the Montana Supreme Court. Interstate Manufacturing Co. vs. Interstate Products Co. (1965) ..... Mont. ....., 408 P.2d 478.

McCormick) without "title" in her name to a third person (Albert Kinney). Under these circumstances, Mrs. McCormick could not have transferred the "title" to Albert Kinney until she obtained a "title" herself. We believe, and the District Court held, (Tr., Vol. I. p's 40 and 64), that Mrs. McCormick could have acquired a "title" by complying with *subsection (e)* of *Sec. 53-109* and then could have (and should have) signed the "title" and given it to Albert Kinney as required by *subsection (a)*. Albert Kinney then should have forwarded it to the Registrar of Motor Vehicles as provided by *subsection (b)*. Failing in this, no title passed to Albert Kinney for any purpose, because of *subsection (d)* of *Sec. 53-109*.

Another reason why definition of the words "non-owned" in the insurance policies involved in this litigation should be held to include the 1949 Ford is that the words "non-owned" are not accurately defined in the policies. If appellant had so desired, it could have defined the words to include the qualified or equitable claim to ownership it asserts here. Appellant could have changed the meaning of the words "non-owned" to exclude vehicles which were not owned but used by the insured for any period of time whatever, but did not do so. It also could have defined the words "owned automobile" to include any vehicle for which a title had

been requested but not received. Again, it did not do so.

Certainly appellant must have known that "owned" and "non-owned" would be construed in light of state statutes governing motor vehicles, especially when its own definition of "non-owned" simply was "an automobile or trailer not owned by the named insured, etc." Failure of an insurance company to define the words "owner" and "owned by" in a liability policy has been held by the Montana Supreme Court to create an ambiguity which was required to be resolved in favor of the insured and against the insurance company. *Keating v. Universal Underwriters, (1958) 133 Mont. 89, 320 P.2d 351.*

Therein, the Court said:

> ". . . the first problem here posed, . . . is, whether or not the car was the 'property of others' or 'owned (by) the named insured' within the meaning of those phrases as employed in the insurance policy.
>
> "It has been held that the term 'owner,' when used alone, imports an absolute owner or one who has complete dominion over the property owned as the owner in fee of real property, Ramsey v. Leeper, 168 Okla. 43, 31 Pac. (2d) 852, 859, and that the words 'owned by' mean an absolute and unqualified title, Baltimore Dry Docks & Ship Building Co. v. New York & P.R.S.S. Co., 4th Cir., 262 F. 485, 488. Whether such is the meaning of the phrases here in question, or if the meaning is varied according to the connection in which they are used, and they are to be understood according to the subject

matter to which they relate, McFeters v. Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am.St.Rep. 388, it is certain, from the defendant's viewpoint alone, the phrases are at best generic and general and not specific and hence ambiguous and uncertain. The phrases are not defined in the insurance policy, nor is there any phraseology or conditions therein, nor is there anything in the facts submitted to this court from which may be inferred any qualified meaning, and, standing alone, we cannot say that these phrases were intended to exclude from the insurance coverage property possessed for sale only and to which the legal title resides in another, even though it be for security purposes alone.

". . . If the defendant insurer had intended to exclude 'floored' automobiles from coverage, it would have been a simple matter for the insurer to have clearly and unequivocally provided therefor by the simple expedient of specifically referring to trust receipts and floor plans in the exclusion clause thereby removing all doubt. The law is plain that the ambiguity and uncertainty caused by the phrases in question must be resolved in favor of the plaintiff insured and against the defendant insurer. Johnson v. Continental Casualty Co., 127 Mont. 281, 263 Pac. (2d) 551."(2)

ARGUMENT ON APPELLANT'S SPECIFICATIONS OF ERROR

All of appellant's specifications of error are argued as one, and we will do likewise. Essentially, of course, this appeal is from the trial court's denial of appellant's motion for summary judgment, and all present argu-

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(2) Sec. 53-109 was not involved in the Keating case because of subsection (c) of 53-109. Subsection quoted on page 48 of appellant's brief.

ments, except one, were made to the trial court prior to the ruling set forth in the "Memorandum Opinion," filed April 1, 1964, (Tr., Vol. I. p. 37, et seq). The one point (relating to the effect of subsection (e)) which was not ruled on then was made by appellant's motion on December 21, 1964, (Tr., Vol. II, p. 4) and rejected by the trial court (Discussion, Tr., Vol. I, p. 62, et seq).

In its "Argument of the Case" (Br., p. 12 et seq), appellant first re-asserts the arguments raised in its December 21, 1964, motion, relative to *Sec. 53-109(e), R.C.M. 1947.* Appellant contends, in essence, that title to the Ford could have been transferred by Mrs. Robert McCormick, as sole heir and administratrix of the estate of C. W. Ehart, to Albert Kinney solely by use of the procedures provided in *Sec. 53-109(e).* This being so, it is contended, *Sec. 53-109(d)* is not applicable because *Sec. 53-109(d)* is said to apply only to applications for "titles" made under *Sections 53-109(a)* and *53-109(b)*, and not to applications made under *Sec. 53-109(e).* (Br., top of p. 13.)

APPELLEE'S ARGUMENT AS TO EFFECT OF SECTION 53-109(e) SUMMARY:

APPELLEE CONTENDS, WITH RESPECT TO THE ABOVE, THAT TITLE COULD NOT HAVE BEEN TRANSFERRED FROM THE ESTATE OF C. W. EHART TO ALBERT KINNEY

SOLELY BY RECOURSE TO *SEC. 53-109(e),* EVEN IF SUCH HAD BEEN ATTEPTED.

Our argument is quite basic, simply that *subsection (e),* in its first 10 words, restricts its application to transfers by operation of law and the attempted transfer *from Mrs. McCormick to Albert Kinney* was not one by operation of law. Thus, *subsection (e)* is not applicable. Instead, the attempted transfer was a voluntary one, governed by *subsections (a), (b)* and *(d).* The trial court adopted this position as the applicable Montana law. (Discussion, Tr., Vol. I, top of p. 64.)

Appellant seeks to avoid this seemingly obvious result by arguing that the Ford was paid for (Br., top of p. 15); that Albert Kinney had the use and possession of the Ford, purchased license plates for it, insured it and took no steps to rescind his contract to purchase it (Br., middle of p. 15). (In short, by asserting that some sort of equitable or qualified claim is tantamount to ownership under the law and the policies.) But appellant ignores the explicit statement of the Montana Supreme Court, in *Safeco Ins. Co. vs. Northwestern Mutual Insurance Co., (1963) 142 Mont. 155, 382 P.2d 174,* that

> ". . . the provisions of the motor vehicle code provide the exclusive method of accomplishing a valid sale and transfer of a motor vehicle,"
>
> *(382 P.2d, at p. 179)*

Appellant seeks next to avoid *subsection (d)* by

arguing (Br., p's 22 through the middle of p. 29) that the entire transfer from the estate of C. W. Ehart to Albert Kinney could have been (or was required to have been) completed solely under *subsection (e)*. It is asserted (Br., p. 25) that Albert Kinney, as the "successor in interest" of C. W. Ehart, could make application for a new title. We emphatically disagree, and an examination of *subsection (e)*, we submit, will exhibit the error in appellant's argument. The words "or successor in interest" emphasized by appellant (Br., p's 24 & 25) obviously are used in the statute to further extend, without specifically naming them, all of the possible entities through which the original owner's title passes by operation of law. For example, guardians, referees in bankruptcy, special administrators and probably many others. But these entities (and those named in the statute) are representing the original owner of legal title. The statute does not say that the recipient of the interest transferred by operation of law, (i.e., the legatee, heir, creditor, beneficiary, purchaser at sheriff's sale, or other persons acquiring title through the executor, administrator, receiver, trustee, sheriff or other representative or successor in interest) could forward an application for registration. Moreover, the phrase "successor in interest" certainly cannot be stretched, as appellant suggests, to cover a subsequent purchaser, as was Albert Kinney.

from a legatee, creditor, heir, beneficiary, or purchaser at sheriff's sale, for this would be a voluntary transfer. Therefore, we contend Albert Kinney alone could not have applied for a title in the manner stated.

As we have stated heretofore in this brief, what the parties should have done to accomplish the intended result was for the administratrix (Mrs. McCormick) to forward to the Registrar of Motor Vehicles an application for registration on the usual form, together with a verified or certified statement of the transfer, setting forth the facts as set forth by appellant (Br., p. 25), to-wit:

> "(1) the reason for involuntary transfer; (2) the title transferred; (3) the names of the persons to whom the title is to be transferred; (4) the process of procedure effecting such transfer; (5) such instruments as may otherwise be required by law to effect a transfer of title. . . ."

This would have resulted in a new certificate of ownership (title) being issued to Mrs. McCormick. Then she should have signed and acknowledged the certificate, as provided by *subsection (a)*, and delivered it to Albert Kinney for transmittal to the Registrar as required by *subsection (b)*. Failing in this, there was no effective transfer of ownership for any purpose because of *subsection (d)*.

In its brief, appellant emphasizes Nos. 3 and 4 (above quoted) and apparently contends that since the

applicant (here, Mrs. McCormick, as administratrix) could have inserted the names of the person to whom title was to be transferred and the "process of procedure" effecting such transfer, she could have put in any name she liked, including a subsequent purchaser from her, Albert Kinney. Again, we argue that this plainly is not authorized by the statute because any such succeeding transfer was a voluntary transfer and to attempt to proceed solely under *subsection (e)*, without complying with *subsections (a)* and *(b)*, would violate the express provisos of *subsection (e)* to the effect that its provisions would not apply to transfers "by voluntary act of the person whose title or interest is so transferred," and that the application for transfer must show the reason for the "involuntary transfer." We ask how Mrs. McCormick could have listed an" involuntary" reason for selling the Ford car to Albert Kinney.

The point appellant misses is that here we have three separate and distinct transactions, one a transfer by operation of law from C. W. Ehart to Robert McCormick, next a transfer by operation of law from Robert McCormick, (Perhaps the first two transfers could have been completed as one), and third, an attempted voluntary transfer from Mrs. Robert McCormick to Albert Kinney.

Appellant asserts (Br., p. 26) that the District

Court "completely missed" the point it was trying to make with regard to the above. We believe it more accurate to say that the District Court was cognizant of the point and ruled against it. (Discussion, Tr., Vol. I, p's 63, 64.)

On page 28 to the top of page 29 of appellant's brief, it is argued that because somebody had to own the Ford, and further because Mrs. McCormick "transferred her title to Albert Kinney, it is obvious that in order to get the title transferred the provisions of subsection (e) of §53-109 will have to prevail." We disagree with this contention for the following reasons:

First, Mrs. McCormick did not transfer her title to Albert Kinney, she only attempted to transfer her title to Albert Kinney, but the attempted transfer has been barred by *subsection (d) of Sec. 53-109, R.C.M. 1947.*

Second, it isn't only *subsection (e)* which will have to prevail in order to transfer title from Mrs. McCormick to Albert Kinney; as we have stated in answer to appellant's previous arguments, *subsection (e)* cannot be applicable to the transfer from Mrs. McCormick to Albert Kinney because it is a "voluntary" transfer, expressly not covered by *subsection (e).*

Nowhere in its brief does appellant explain how the transaction between Mrs. McCormick and Albert Kinney differs from the "ordinary transfer" referred to on top of page 29 of its brief.

The historical portions of appellant's brief from the middle of page 29 to the bottom of page 33 would be relevant only in the event the transaction between Mrs. McCormick and Albert Kinney was not an ordinary, voluntary transfer governed by *subsection (d)*. In view of the trial court's decision that the transaction was ordinary and voluntary, it would not appear appropriate to argue the irrelevant matter.

It is also irrelevant, we submit, whether appellant's statement at the bottom of page 33 of its brief, as follows:

> "At the time of the transaction between Albert Kinney and Mrs. McCormick, she was a 'successor in interest' to the title which had transferred by operation of law, first to Robert McCormick, and then after his death to her. Therefore the correct procedure for her was outlined in subsection (e) of the statute and the punitive effect of subsection (d) does not apply."

is an accurate statement of the law. It is probable that the "correct procedure *for her* (Mrs. McCormick) was outlined in subsection (e) of the statute" (underlining ours), and it may even be that *subsection (d)* didn't apply to the transfer by operation of law to her (the Montana Supreme Court has not ruled on that question), but that certainly does not mean the subsequent transfer from Mrs. McCormick to Albert Kinney was not covered by *subsection (e)*.

Appellant argues (Br. p. 34) that because Mrs. McCormick was not an "owner in or to a motor vehicle,

etc.," and thus could not transfer title to Albert Kinney under *subsection (a)* of *Sec. 53-109, R.C.M. 1947,* the trial court's designation of the transfer from Mrs. McCormick to Albert Kinney as a "voluntary" transfer asked for something that was "presently unworkable." As to the "presently" part, we must agree, and the trial judge pointed this out when he said:

> "Obviously, the administrator of the estate and Mrs. McCormick should have taken proper steps under subsection (e) to obtain a certificate of ownership."
>
> *(Discussion, Tr., Vol. I, p. 64.)*

After taking such steps, and upon receipt of the new certificate of ownership (title), Mrs. McCormick should have complied with *subsection (a).* We see nothing in the statute which guarantees to anyone that a transfer from a deceased owner to a purchaser from an heir can be accomplished in one fell swoop.

Appellant says the lower court's reasoning to the effect that the transfer to Albert Kinney was required to have been in two steps, from Ehart to Mrs. McCormick and from Mrs. McCormick to Albert Kinney, is "an absurdity" (Br., p. 36) and that the lower court's ruling embodying this reasoning is an "incredible decision" (Br., p. 4). We submit that the lower court's decision not only is not incredible or absurd, it is well-reasoned and accurately reflects the intent of *Sec. 53-109.*

In a nutshell, appellant's position seems to be that

after an owner's death, and until a new certificate of ownership (title) is finally issued to someone, the heirs, legatees and possibly purchasers of such persons can transfer ownership of a motor vehicle willy-nilly without in any way complying with *subsections (a)* and *(b), Sec. 53-109.* We contend that it would be a perversion of the entire statute if its mandatory provisions could be dispensed with solely because the title owner died.

At the bottom of page 36 and top of page 37 of appellant's brief, it is said that the District Court's final ruling on this matter is at variance with the prior ruling on motion for summary judgment. The footnote quoted on page 37 of appellant's brief is cited as evidence. The footnote, however, does not say that there could be a direct transfer from the Ehart estate to Kinney, it merely says that in view of *subsection (e)* there was a method whereby Mrs. McCormick could procure a title certificate and then endorse it over to Albert Kinney. The later opinion by Judge Jameson is, of course, the best indication of what he meant by the footnote.

ARGUMENT AS TO EFFECT OF SEC. 53-109(d) (VOIDABLE VS. VOID CONTRACT)
SUMMARY:

APPELLEE'S CONTENTION IN THIS REGARD MERELY IS THAT NOMENCLATURE OF THE CONTRACT BETWEEN MRS. McCORMICK

AND ALBERT KINNEY AS VOIDABLE OR VOID MEANS NOTHING — THE PURCHASE CONTRACT BETWEEN MRS. McCORMICK AND ALBERT KINNEY WAS INVALID AND INEFFECTIVE FOR ANY PURPOSE BECAUSE THE STATUTE *(SEC. 53-109(d))* MADE IT SO.

Appellant asserts that the purchase contract between Mrs. McCormick and Albert Kinney was not void but voidable (Br., p. 37); that Albert Kinney never acted to rescind it (Br., p. 38) and that until rescinded it is valid and binding without regard to *subsection (d),* (Br., p. 41). Appellant raised this point before the trial court and it was disposed of by Judge Jameson in his opinion denying appellant's motion for summary judgment (Memorandum Opinion, Tr., Vol. I, p. 43).

We do not see that it is essential, or even desirable, to categorize the legal state of the sale and purchase contract on the date of the accident; patently the contract was not complete because *Sec. 53-109(d)* said it was not, and labeling the contract as voidable does not make it complete. We submit that until the contract was complete, Albert Kinney could not be considered the "owner" of the Ford.

Sec. 53-109 is a special statute on a special subject, and where in conflict with another statute, such as those cited by appellant (Br., p's 26 to 30), the special statute

must prevail. *Williamson v. Skerritt (1963), 141 Mont. 422, 378 P.2d 215, at 218.* To interpolate other statutes or to classify with textbook labels merely confuses the entire subject.

Sec. 53-109(d), in the simplest yet most obvious terms possible, says that if the registrar has not issued a certificate of ownership (title), three thing occur: (1) delivery of the vehicle shall be deemed not to have been made; (2) title shall not have passed, and (3) the transfer shall be incomplete and not valid or effective for any purpose. This statute needs no construction. How appellant can take this subsection and argue that an unrescinded contract for purchase and sale of a motor vehicle, where no certificate of ownership has ever been requested, is not within its terms, is inconceivable. To hold so would be to hold that purchasers and sellers could virtually ignore the statutes requiring registration of motor vehicles just by refraining from rescinding their purchase and sales contracts. This flies directly in the face of the statement by the Montana Supreme Court in *Safeco,* supra, that

> ". . . the provisions of the motor vehicle code provide the exclusive method of accomplishing a valid sale and transfer of a motor vehicle."
>
> *(382 P.2d, at p. 179.)*

We contend that no matter what rights Kinney had in the Ford, he wasn't the "owner" under the policies.

He wasn't the owner because both the statute and *Safeco,* supra, (which also dealt with "non-owned" vehicle coverage — see *382 P.2d, at 175*), say he wasn't, and no semantic legerdemain can make him the owner. Judge Jameson felt the *Safeco* decision was controlling in this regard. (Discussion, Tr., Vol. I, p. 78.)

Parke v. Franciscus (1924), 194 Cal. 284, 228 Pac. 435, and the other cases cited by appellant (Br., p's 39, 40) are not applicable here. Most of such cases deal essentially with possessory claims or liens less than title or ownership.[3]

In *Parke v. Francicus,* supra, the court held first that compliance with the registration statutes of California was essential to transfer of title *(228 Pac., at 440, 441)*; secondly, it discussed the possessory rights of the parties. The Supreme Court of California has recently confirmed the holding in *Parke v. Franciscus,* supra, to the effect that compliance with the registration statute is

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(3) **Dennis v. Bank of America, etc., (1939) 34 Cal.App.2d 618, 94 P.2d 51,** and **Carpenter v. Devitt, (1942) 49 Cal.App.2d 473, 122 P.2d 79,** can be distinguished on another ground also, it being that the statute was different from **Sec. 53-109.** The California statute was amended, prior to the time the above cases were decided, to delete certain of the provisions of our statute and to add the defense of estoppel. See statute quoted, **122 P.2d, at p. 80** and **94 P.2d, at 53.** In **Willard H. George, Ltd., v. Barnett, (1944) 65 Cal.App.2d 828, 150 P.2d 591,** the court held the section quoted in the above cases **(Sec. 186)** not even applicable to the facts. **(150 P.2d, at 592). Henry v. General Forming, Ltd., (1948) 33 Cal.2d 223, 200 P.2d 785,** involved the same section **(Sec. 186)** after it had again been changed to delete some of the restrictive provisions (compare statute quoted, **200 P.2d 786** with **122 P.2d, at p. 80).** See also, **Smith v. Western Casualty & Surety Co., (1943) 60 Cal.App.2d 508, 141 P.2d 10** for a tabulation of the statutory changes.

essential to transfer of title. *(Cooke v. Tsipouroglou (1963) 31 Cal.Rep. 60, 381 P.2d 940, at 943.*

The inapplicability of the cases dealing with title as distinguished from possessory claims, etc., is discussed in *U.S.F.&G. Corp. v. Myers Motors (D.C.Va. 1956), 143 F.Supp. 96, at p. 99,* as follows:

> "* * * We believe that a clear distinction can properly be made between sales of motor vehicles, when title (or ownership or general property) is supposed to pass between the parties to the transaction, and other claims or liens less than title or ownership. It might well be that these recordation provisions are mandatory as to sales of motor vehicles in that they are designed for three very definite purposes: (1) To suppress automobile thefts; (2) to provide the state with a convenient and accessible record of title for tax purposes; (3) to provide a convenient and accessible method of identifying the ownership of an automobile for police purposes in connection with its operation on the highways of the state. These three reasons for attaching hard, deterrent results to any failure to comply with recordation statutes in connection with automobiles, do not exist as to liens or other claims less than title. Normally, one who has beneficial title to an automobile would be the one who would operate it on the highway, would pay the taxes and would be most concerned in preventing a theft of the car. The criminal sanctions under the Virginia Motor Vehicle Act, we think, were enacted primarily with reference to those having complete ownership, or at least beneficial title, as distinguished from security title or any lesser measure of interest in the automobile."

The point is also discussed in *Sly v. American Indemnity Co. of Galveston, Texas (1932), 127 Cal.App.*

202, 15 P.2d 522, wherein the insurance company's claim was quite similar to appellant's in this case. The Court said:

> "From the above resume of the testimony of this witness it appears that there was some evidence that the insured had not, prior to the date of the accident, made a transfer of his interest in the automobile, and that, therefore, the court's finding that the insured had not sold and delivered the automobile to Mills is not entirely lacking in evidentiary support. This statement is made without taking into consideration the effect of noncompliance with the provisions of section 45, subdivision (e) of the California Vehicle Act (as amended by St. 1929, p. 514). The language of this section is as follows: 'Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.'
>
> "This section appears to furnish an additional reason for sustaining the court's finding that no transfer of interest took place since it is undisputed that no new certificate of registration was applied for or issued prior to the date of the accident, and, therefore, under the plain language of the section, the intended transfer must be deemed to be incomplete and not valid or effective for any purpose. Appellant contends, however, that the exchange actually took place, possession of the automobile was surrendered to Mills, Krause not only took possession of the motorcycle but dealt with it as his own, and with the full consent and permission of Mills turned it over to the motorcycle dealer as the initial pay-

ment on the purchase price of another motorcycle. It is then argued by appellant that, although the hereinabove quoted section of the California Vehicle Act rendered transfer of the legal title impossible by reason of noncompliance therewith, nevertheless, transfer of an equitable interest was consummated and Mills became the equitable owner of whatever interest Krause, the insured, had in the insured automobile. To sustain the argument thus advanced, appellant cites a number of decisions wherein purchasers of motor vehicles in possession of such vehicles have been permitted to recover in actions of conversion or claim and delivery although such purchasers had not complied with statutory provisions requiring reregistration and the issuance of a new certificate of registration. It is to be observed that the decisions thus relied upon are cases wherein possessory actions were instituted by persons rightfully in possession and entitled to possession. Nevertheless, it must be conceded that their effect is to modify appreciably the very broad and plain language, hereinabove quoted, of section 45 of the California Vehicle Act."

Regardless of the above, however, we contend that cases from California and other states are not germaine here. The Montana Supreme Court in *Safeco,* supra, has ruled on the effect of non-compliance with our registration statutes and has said, with regard to applicability of laws and decisions of other states:

". . . we are duty bound to construe and judicially determine the provisions of the motor vehicle code as they are written, avoiding the multiple and confusing decisions of our sister states, because none of them contain the exact language present in our statutes."

(382 P.2d, at p. 178.)

Illustrative of the diversity of the decisions in other states are the many cases cited in *Blashfield, Cyclopedia of Automobile Law and Practice, Vol. I, Part I, Permanent Edition, sec. 304,* especially in the pocket part under footnote number 8.5, and *Vol. 7, Permanent Edition, Sec. 4252.*

Appellant (Br., p. 41, et seq) seeks to find some solace in *Firemen's Insurance Company of Newark, New Jersey v. Show, (D.C. Mont. 1953), 110 F.Supp. 523.* This case was cited to the court in *Safeco* and to the trial court. (Memorandum opinion Tr., Vol. I, p. 42.) However, the *Show* case was not in point in *Safeco* and is not in point here. The reason is that in *Show,* the prior owner's (Perry Motors) title certificate was executed in accordance with *Sec. 53-109(a)* and delivered to J. W. Show (the father of Jerry Show) on December 5, 1950. The certificate was duly transmitted to the Registrar of Motor Vehicles and on December 21, 1950, a new title was issued to J. W. Show *(110 F. Supp., at 525).* The accident happened in between, on December 17, 1950, at a time when the only insurance policy on the pickup was held in the name of Jerry Show, who actually paid for the truck. Judge Pray correctly held, on the title question, that the claim of the insurance company that title was still in Perry Motors because no certificate had issued on December 17, 1950, to J. W. Show,

was without merit. *(110 F.Supp. at 528, 529).* This is consistent with *Safeco* because *Safeco* held:

> "it seems to us rather clear that when the seller has executed the transfer upon the certificate of ownership and delivered it and the motor vehicle the sale is complete and any delay on the part of the registrar in issuing the new certificate of ownership would have no effect. In any regular transaction the new certificate of ownership is required to be issued by the registrar and issues as a matter of course. The transfer then becomes complete and valid and dates back to the time of the transfer between the parties. If the transfer has not been made in compliance with the statute and the registrar by reason thereof does not issue a new certificate of ownership, clearly there was no transfer of ownership in its inception."
>
> *(382 P.2d, at 178.)*

The remainder of *Show* is merely a holding that since Jerry Show told the insurance company's agent of the title situation, before the policy was issued, the company waived the right to deny coverage on the ground that the insured's interest was other than unconditional and as sole owner, *(110 F.Supp, at 527).* This, also, is not alarming and would probably have ruled in the instant case if Albert Kinney had had an accident when the Ford policy was in existence. However, *Show* is not authority for any point involved in this litigation, nor, we submit, was it authority in *Safeco.*

At page 45 of appellant's brief appears the following:

> "Thus far the Montana Court has not passed upon the question of ownership under an unrescinded contract for purchase of an automobile. . . ."

We question the correctness of this statement, even though the ultimate answer is not important to the issues on this appeal. In our view, *Safeco* involved a contract for purchase and sale of a motor vehicle which, at the time the accident occurred, as in the instant case, had not been rescinded. Liability under the policies involved in both the *Safeco* case and this case is determinable as of the date of the accident. The only way the result in *Safeco* could have been changed in this regard was for the parties to have executed and transmitted the certificate of ownership to the Registrar of Motor Vehicles within 10 days after the sale and upon issuance of a new certificate to Dean, his title would have reverted back to May 9, 1960, and he would have been considered the "owner" of the auto on May 11, 1960, the day of the accident. Since this was not done, the Court held no title passed to Dean. The ultimate rescission by Dean (if there was one) was quite irrelevant.

In the same paragraph (Br., p. 45) appellant contends that the Montana Supreme Court "has not passed upon the bearing of the definition of 'owner' found in *Sec. 59-133, R.C.M. 1947.*" (sic) This is not an accurate statement. In *Safeco, (382 P.2d, at 179)*, the Court considered *Sec. 53-133* and held its definition of "owner"

would not govern where the context of *Sec. 53-109* required a different interpretation.

CONCLUSION

We respectfully submit that the judgment of the trial court is well founded, that all conclusions are reasonable and not clearly erroneous, and that the judgment should stand.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

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ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Appellee's Brief and receipt of a true and correct copy thereof is hereby acknowledged this 15th day of February, 1966.

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